

PRESTON CJ
AND THE JUDGES OF THE
LAND AND ENVIRONMENT COURT

FRIDAY 1 MAY 2009

**SWEARING IN CEREMONY OF
RACHEL ANN PEPPER
AS A JUSTICE OF THE LAND AND ENVIRONMENT COURT OF NEW
SOUTH WALES**

MS PEPPER: Chief Judge, I have the honour to announce that I have been appointed a Judge of the Land and Environment Court of New South Wales. I present to you my commission.

PRESTON CJ: Thank you, Justice Pepper. Acting Registrar, could you please read the commission.

(Commission read)

PRESTON CJ: Acting Registrar, do you have the form of affirmation? Justice Pepper, I now invite you to rise and take the affirmations of office. First the affirmation of allegiance and then the judicial affirmation.

(Affirmations of office taken)

I now invite you to resume your seat and to subscribe the affirmations, after which I shall attest them.

(Affirmations subscribed and attested)

Registrar, I hand to you the form containing the affirmations so that they may be placed amongst the records of the court.

Justice Pepper, I welcome you to the Land and Environment Court both on my own behalf and on behalf of all of the Judges and Commissioners of the Court.

Ms Katzmann, do you move?

MS KATZMANN: May it please the court.

On behalf of the New South Wales Bar I warmly congratulate your Honour on your appointment. It is a fitting tribute to your prodigious talents and your commitment to the rule of law. Having wreaked havoc in Fiji where, with Bret Walker SC, you appeared for the deposed Prime Minister Mr Laisenia Qarase against the coup leader, Commodore Bainimarama, the Land and Environment Court must seem like a very safe haven. It will be a long time, I am sure, before we see a Pepper's Resort within cooee of Suva.

"If you need me, let me know," you informed the Attorney. "I'm still free." And so it was that your Honour's return from Fiji was quickly followed by the announcement of this appointment. As the man with whom your Honour is deeply in love, Benny Andersson, or more accurately his offsider, Bjorn Ulvaeus, put it, the winner takes it all.

I had hoped that the announcement of your appointment on 1 April was merely an April Fool's Day joke for, as Oscar Wilde might have said, 'to lose one bar councillor is a misfortune, but to lose three looks like criminal negligence'. Our loss, your Honour, is a profound one. Your contribution to the work of the Association over many years, especially on the Equal Opportunity Committee and as a member of the Council's Executive, has been invaluable. We will miss you a great deal. It is a tribute both to your support for the Bar and to your commitment to human rights that, despite your elevation, you have offered to remain on the Equal Opportunity Committee.

And while I am on that subject, may I say that this morning I was speaking to the President of the Human Rights Commission, The Honourable Catherine Branson QC. She very much regrets that she cannot be here today to share in this occasion. She asked me to pass on her congratulations to you.

The daughter of English and Italian migrants, your Honour was born in Hamilton, Ontario, a place which you yourself somewhat irreverently refer to as “the armpit of Canada”, a city made famous by its steelworks, an old Studebaker factory and, more recently, the Canadian Football Hall of Fame.

At the age of fifteen you were uprooted from a climate where the yearly average maximum temperature is 12 degrees Celsius, and transported to the comparatively balmy climate of Perth. There you attended Swanbourne Senior High School, whose claim to fame was its proximity to what is euphemistically described in official publications as a “clothing optional beach”.

You have for some time aspired to hold judicial office. However, it was not always thus. As a child you yearned to be a doctor and practised making incisions on teddy bears. After completing high school you rejected the advice of your year 12 history teacher to study law, which you were convinced would be far too boring, and returned to Canada intent on studying medicine. But after a half-hearted attempt at a pre-med science degree at the University of British Columbia, and fed up with spending another summer wrapped in woollens, your Honour returned to Australia, this time to study arts, majoring in French, and law, graduating with first class honours in law.

You chose to study at the Australian National University, lured by the misconception that the national capital would be an exciting, cosmopolitan place. Reality struck when you first stepped off the bus in downtown Civic. You burst into tears.

Your Honour was admitted as a solicitor in 1995, and you began your legal career at the firm of Allen Allen & Hemsley, but you were gone in less than a year to take up the position of associate to the Honourable Michael McHugh, then a justice of the High Court. When you completed your term you

spent six months as a research officer at Clayton Utz before joining the staff of the Law Faculty first at the University of New South Wales and then UTS, where you lectured consecutively in legal research and writing and discrimination law.

In August 1997 you bit the bullet and came to the bar. You read on 7 Wentworth Chambers with Justin Gleeson SC and John Marshall SC. In 2002 you purchased a room on 12 Wentworth/Selborne where you spent seven happy years. I know that the members of those chambers without exception, though delighting in your success, are extremely sorry to see you go.

Your practice was diverse from the start. You accepted briefs in commercial law, equity and professional negligence, but there was a heavy emphasis on public law, particularly constitutional, administrative and discrimination law, as well as local government, environment and planning. You also branched out into criminal law, most recently working with Peter Hastings QC in the inquiry into the murder conviction of Phuong Ngo. In the finest traditions of the profession you also took on a significant amount of pro bono work.

From time to time your work took you to the High Court. Usually you were led, but on occasions you enjoyed a speaking part. On one such occasion, when dumped by the Solicitor General for New South Wales, standing on my left, you thought you could get away with relying on the written submissions, but you were stopped in your tracks by Justice Kirby who cheekily asked what you had to say about the position in Canada. Despite your assistance, however, the Canadian position never even made it to the footnotes in the judgment.

A large proportion of your Honour's work at the bar involved appearing before a wide range of specialist tribunals, inquiries and inquests. This has caused some to describe your practice as disastrous, not because you were unsuccessful of course, far from it. Rather, it is because disasters both natural and man-made have either preceded or followed your Honour's appearances.

In one such case, the coronial inquiry into the sinking of the small vessel *Malu Sara*, held under trying conditions on Thursday Island, there were logistical difficulties involved with a light plane and certain items of luggage were delayed. Your Honour was thus forced to appear before the inquest in a brightly coloured Hawaiian shirt.

But it was not all work and no play for your Honour. The unfortunate passengers of the *Malu Sara* were found to have drowned and their bodies consumed by aggressive marine life, abundant in the area. It is testimony to your Honour's courage that during a break in the hearing you indulged in one of your favourite pastimes - fishing - in a small vessel no less. People who fish are notorious for embellishing their stories about the one that got away, but it seems that your Honour actually landed a catch - a magnificent tuna, possibly several feet long, which was cooked that night.

Your Honour is also a very good footballer. You were the striker in the Code Blue team in the Gladesville League, taking penalty corners with Beckham-like skill. Fans would shout 'you can't crack the Code.'

Once again, your Honour, the New South Wales Bar congratulates you on your appointment. I hope you have the time of your life.

May it please the Court.

PRESTON CJ: Mr Catanzariti, do you move?

CATANZARITI: May it please the Court.

I am pleased to add my remarks on behalf of the solicitors of New South Wales on this auspicious occasion. Your Honour's appointment is testimony to the skills, diligence and strength of character you have demonstrated throughout your career, from your admission as a solicitor in 1995, culminating in today's celebration of your appointment to the bench.

We are delighted that your parents, Cherry and Roland, have been able to witness today's celebration, despite possible jet lag, along with your brother Kai, who is a chef here in Sydney. Your sister Kirsten, an assistant bank manager, who lives in Canada.

Born in Hamilton, Canada, your Honour's family moved to Perth's western coastal strip in the early eighties. By all accounts it was a bit of a culture shock, but no doubt a pleasant one, to be soaking up the balmy weather after the snowy conditions left behind.

Your Honour attended Swanbourne Senior High School, now the site of a residential redevelopment, a more modest comment from me than my colleague Anna Katzmann SC.

At this stage of your education there was no indication that your Honour would pursue a career in the legal profession. In fact, my understanding is your Honour's first love was to be a doctor and, as Anna Katzmann SC has indicated, many a teddy underwent horrific surgery in your quest for perfecting skills, perceived as necessary to embark upon a medical career. However, an early biology practical at the University of British Columbia, where you were enrolled, which involved the dissecting of a rat, prompted a quick and lasting change of heart.

Your Honour returned to Canberra to complete a Bachelor of Arts at the Australian National University in 1992 and went on to obtain first class honours

in a Bachelor of Law in 1994. At that time your Honour was supplementing your income as research assistant at the University's Australian Centre for Environmental Law. Perhaps this experience planted the seeds for your future life on the bench.

In your first year as a solicitor your Honour joined Allen Allen & Hemsley, as it then was known, before taking up the position of associate to Justice McHugh at the High Court of Australia. A prestigious position and one in which you were highly regarded.

Your Honour also had a short stint as a research officer at Clayton Utz, my home for the past twenty-one years. Clearly that experience triggered your desire to go to the bar where you read with Justin Gleeson SC and John Marshall SC. The work was mainstream commercial. John described your Honour as a bright, capable barrister and a worker for causes. An added bonus for John was your shared interests in skiing and soccer. The latter was curtailed in recent years when a knee reconstruction saw you give up your place in the University of New South Wales women's squad. However, your skiing has not suffered and your passion has seen you continue to traverse slopes in Europe, Canada, the United States and most recently Japan.

Your Honour regards your greatest mentors as Michael Slattery QC and Peter Garling SC and you were Peter's junior in the case of *Optus v Leighton & Ors* relating to water damage to premises and equipment at Optus Communications Data Centre at Rosebery.

Your Honour also assisted Justice Perram, Federal Court of Australia, or Nye Perram SC as he then was, in representing ousted Prime Minister Laisenia Qarase in the 2006 Fiji coup High Court case *Qarase v Bainimarama*. Justice Perram described your Honour as diligent, astute, hardworking and

entertaining. The High Court ruled in favour of the interim government, however last month that lower court ruling was overturned when the Fiji Court of Appeal declared the coup unlawful and called for elections to be held. Your Honour again assisted in this appeal on behalf of the appellants with Bret Walker SC and Suva lawyer Tavita Fa. It just so happens that today, 1 May, was D-Day for the date of those elections to be set if Fiji was to participate in the Pacific Islands Forum.

In recent years Peter Moran from Colin Biggers & Paisley has had the occasion to brief your Honour and he remarked upon your professional, methodical and thorough approach which ensured you were always on top of the brief and that cases were run smoothly and without controversy. Well, almost. Retained by Colin Biggers & Paisley with regard to a professional negligence claim, I understand your Honour called the client in for an interview on a Saturday because the evidence was due. This rather emotional client came to the conclusion that your Honour had deliberately seated her in a position of disadvantage so that the sun was in her eyes. The said client would no doubt have again felt disadvantaged in the courtroom upon noting that the seating of some individuals are more elevated than others.

Your Honour is joining an innovative and progressive specialist court where proceedings and decisions are subject to public scrutiny. The Court's role in applying the principles of ecologically sustainable development encompasses a wide jurisdiction and provides for a heavy case load. That workload is unlikely to decrease. Just last month the Court assumed jurisdiction for mining matters.

I am sure your Honour will be a welcome and valuable addition to the Court and that your skills and experience will prove invaluable. On behalf of

the solicitors of this State I congratulate your Honour in your appointment and wish you well in the years ahead as a judge of this Court.

May it please the Court.

PRESTON CJ: Justice Pepper, I invite you to reply.

PEPPER J: Chief Judge, Chief Justice, other Justices and Judges, Solicitor General, Commissioners, members of the profession, ladies and gentlemen, thank you for attending this morning. Your presence here today is deeply humbling. I thank the President of the Bar Association of New South Wales, Ms Anna Katzmann SC, and the President of the Law Society of New South Wales, Mr Joe Catanzariti, for their overly generous words. This is one occasion where misleading the Court will not incur sanction.

As those who know me are aware, I have faced today with increasing trepidation. No doubt to assuage my apprehension the Chief Judge has promised me an all singing and dancing version of the court song. I have diligently scoured the Court website and can find no mention of such a ditty. Perhaps, and there will be an *a capella* rendition of that Kermit the Frog classic, 'It's Not Easy Being Green', green being the official colour of the Court's stationery, just in case anyone is concerned that they may have detected bias, apprehended or actual, in a judge of twenty minutes standing.

The promise did, however, cause me to reflect on what musical piece I would nominate, sitting here, that would best represent my current state of mind. In light of the remarks made by others this morning perhaps it should be 'I Fought the Law and the Law Won', or for those South Park aficionados 'Blame Canada'. Let's face it, if the weather had been better in Vancouver I probably would not be here now.

However, my formative years were in the eighties and in this regard the

song 'Once in a Lifetime' by Talking Heads seems most apposite. The verses that resonate most audibly for me are as follows. I have taken the liberty of modifying them slightly for context:

'And you may find yourself in another part of the world

...

And you may find yourself in a beautiful [court]house with a beautiful wife

And you may ask yourself 'well, how did I get here?'

I 'got here' by two means. First, as a direct beneficiary of the enduring support and love of others, and, second, as a result of fate.

Turning to fate first. It was good fortune alone that caused my family to relocate from the frozen lands of Canada over twenty-five years ago to Perth. When I was first informed of the impending migration my initial reaction was one of alarm: I did not like haggis or brown spirits. Fortunately, the destination was Perth, Western Australia. This proved to be a blessing in many respects, not the least of which because of my abject failure to master an Australian accent. I would have had no hope with a Scottish brogue.

It was also good fortune that resulted in me attending Swanbourne Senior High School where I benefited, at the expense of the State government, from a secondary education equal to none.

This in turn led me to the Australian National University where I was the grateful recipient of a comprehensive grounding in all fields of law taught by such doyens of academia as Professors Jim Davis, Don Gray, John McMillan, the late Philippa Weeks and Fiona Wheeler.

They were indeed the halcyon days which, given the calibre of instruction I was receiving, could not help but instil in any student an interest and passion

in the law which has, in my case at least, remained ever since.

In particular I owe a debt of gratitude to Professor Fiona Wheeler, my constitutional law lecturer, who due to her excellent and patient tutelage enlivened my interest in public law. I confess here, however, that it was not so much fate that resulted in me attending her lectures, but my intellectual inability, not to mention my failure at having completed the requisite weekly reading, to grasp the complex Socratic factual scenarios put by Professor Leslie Zines to his students. These invariably involved trucks laden with dry fruit and chicory crossing various state boundaries attempting to engage in free interstate trade. Needless to say, it was not long before I transferred out of his class.

Again, fortune favours the brave, or in my case the indolent, because it was Professor Wheeler who encouraged me to apply to the High Court to be a judge's associate. For this suggestion I am forever grateful as it led me to the very privileged position of being an associate to, as he then was, the Honourable Justice McHugh. I am honoured by his presence here today.

The opportunities afforded to me during my time as an associate at the High Court were without comparison and his Honour was, and continues to be, a source of inspiration, both professionally and personally. Indeed it was he who ensured that I did not renege on the obligatory promise given by all of his putative associates during their interviews, particularly the women, that they would go to the Bar and be quick about it.

Not having attended any educational institution in New South Wales and my time as a solicitor having been somewhat short-lived, I knew no-one who would be foolish enough to brief me. But my naïve haste in being called to the Bar so early was more than compensated for by the generosity of my former

employer who willingly made the necessary and critical introductions which resulted in me reading on Seven Wentworth Chambers.

Justin Gleeson SC and John Marshall SC kindly agreed to tutor me. Their initial support and guidance in my early years at the Bar proved invaluable. I thank them for their patient instruction and advice.

My good fortune continued when an opportunity arose to join the Twelfth Floor of Wentworth/Selborne Chambers. A more collegiate set of chambers is beyond my imagination and the generosity and assistance I have received whilst a member of that Floor was and continues to be overwhelming. The personal and professional friendships that I have made in my nearly seven years there will, I have no doubt, persist well beyond today's festivities. It is these colleagues who not only celebrated my successes, but who also, and more importantly, picked me up and dusted me off after my failures, of which there were many. I shall miss them terribly.

I similarly wish to acknowledge several individuals without whose unfailing support and generosity I simply would not be here today. A barrister's life is challenging. These challenges, in my opinion, are all the more acute if you are female. With the affluxion of time, and given the number of astonishingly talented women coming to the Bar, I am confident that in the near future this last observation will soon be reduced to a mere historical footnote.

This was not, though, the case when I commenced at the Bar nearly twelve years ago. In addition to the Honourable Michael McHugh, from the outset I have had the priceless benefit of ongoing mentorship from two individuals in particular, namely, Michael Slattery QC and Peter Garling SC. Not only did they assist and encourage the development of my practice, but

they ably fulfilled the role of 'troubleshooters' in times of crisis. On the Twelfth Floor this task has been willingly, and without hesitation, undertaken by John Robson SC. I cannot thank all three enough. I am, moreover, delighted that in each case over time the relationship of mentoring has been subsumed into one of friendship.

My professional development has of course been dependent on the goodwill and the loyalty of those who have been brave enough to brief me. Two instructing solicitors are unparalleled in this regard. On the barest of recommendations, both from senior male barristers, they not only briefed me early, but they continued to brief me often. This was, in both instances, long before the adoption of an equitable briefing policy became fashionable. They are, Peter Moran of Colin Biggers & Paisley and Paul Buchberger of the constitutional law section at the Crown Solicitor's Office. One was the genesis of my commercial practice; the other my public law practice. I thank them both.

Having said this I am told that the constitutional law section is secretly relieved at my elevation, fearing abrogation were they ever to brief me again given the disastrous consequences of my last appearance in Fiji.

It was, moreover, a chance conversation with the Honourable Justice McColl, then the President of the Bar Association, that caused me, upon her urging, to run as an 'under five' representative on Bar Council. Since then I have had the great privilege of serving not only under her Honour, but also under the Honourable Justice Harrison, as he now is, Bret Walker SC, Michael Slattery QC and the current President, Anna Katzmann SC.

I enjoyed my time on Bar Council immensely. It proved deeply rewarding, and at the very least, it has enabled me to give back to a profession that has been so generous to me in turn.

The dedicated staff at the Bar Association, led by the tireless Philip Selth, who I am fortunate to count as my friend, must be applauded. Few are aware of how much they accomplish daily on the Bar's behalf. I therefore mention it today. It has been more than a pleasure to work along side them.

To the extent that I have enjoyed success at the Bar I did so in part because I had the benefit of skilled and motivated clerks. During my time on Seven Wentworth Chambers I was under the care and control of Bob Horne and Andrew Laughlin. Whilst on the Twelfth Floor it has been Bob Rymer who has ensured that I have been kept occupied and out of trouble. I thank all three of them. Bob Rymer has been ably assisted by staff, the calibre of which include, Bill Telfer, Kerrie Merriman and Anne Clark.

Further, I have the benefit of excellent secretarial assistance in, initially, Catherine Haines, and more recently, Jasmine Geary. Their ability to placate the first signs of panic and to meet deadlines that were invariably described by me as 'five minutes ago', continues to engender my respect and awe.

Likewise, I was blessed with two exceptional readers, Jason Spinak and Lucinda Wilson. What I lacked in quantity was more than made up for in quality. Though they do not need it, I wish them every success at the Bar.

In answering the question 'how did I get here?' I now wish to publicly extol, acknowledge and thank the intellectual and emotional guidance and care I have received from so many, so often.

My mother, Cherry Jensen, who is present here today from Canada, has sacrificed more than I have words to adequately describe in order to afford me the opportunities and experiences necessary for me to be present at this ceremony. If I am able to exercise the functions of my office with but a fraction of the compassion and fairness that she dispenses daily to those around her I

will be very grateful indeed. She remains a constant source of inspiration. My infinite gratitude to her is matched only by my infinite love. Thank you.

I am also indebted to, in no particular order - sibling rivalry is a terrible thing - my brother Kai Jensen and my sister Kirsten Stevens. They are both a constant source of love, friendship and support. Thank you.

My father's support has also been unfailing notwithstanding my itinerant lifestyle. I have moved not just cities, provinces, states, but countries and hemispheres. Despite the dislocation that such distances cause, he has always sought me out and today is no exception. He too has suffered the rigours of a long haul from Canada to be present. Thank you.

I am indebted to my partner, Meredith Clark, for her love and companionship. Living with a barrister is no easy task. First, not everyone finds the vagaries of prerogative writs as sexy as I do. Second, the Bar imposes a terrible burden on relationships. She has endured this burden with a generosity, grace and patience which, in many instances, has defied comprehension. A near decade of constant late nights, sacrificed weekends and the concomitant stress. Thank you.

Finally, I acknowledge the unwavering comfort of my friends outside Phillip Street. My second family. Present through both fair and foul weather. I am honoured by the presence of so many here today. I should add though, that regular criticism by them of my habitual tardiness must now be tempered by the fact that for once in my life I have achieved something not only on time, but early.

I would also like to thank all those who have congratulated me and offered me their best wishes. The response to my appointment has been overwhelming. Your collective goodwill is a source of comfort to me as I

commence this new role and the accompanying challenges.

These challenges, however, are ones that I albeit nervously embrace. This Court is unique in so many respects. It has a jurisdiction which is disproportionate to its size, but which is entirely proportionate to its importance in society today. I am immensely appreciative of the opportunity to be a participant within it. In return, I will endeavour to fulfil the duties of my office to the very best of my abilities and with the diligence and dignity that it demands and deserves.

Thank you for attending today.

PRESTON CJ: The Court will now adjourn.

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